U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUN 18 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) subsequently rejected the appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In its rejection notice of September 22, 2011, the AAO stated:

> Under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) . . . , if an attorney files an appeal with the Administrative Appeals Office, the filing must include a newly executed Form G-28 Notice of Entry of Appearance as Attorney or Representative. . . .
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> The petitioner filed the Form I-140 petition on July 30, 2009, with a Form G-28 dated July 24, 2009, naming [redacted] of Banta Immigration Law as the petitioner's attorney of record. The director denied the petition on May 27, 2010. Another attorney with the same firm, [redacted], filed the appeal on June 24, 2010, but the filing did not include a new Form G-28 as required. Instead, the petitioner submitted a photocopy of an earlier Form G-28 from [redacted], managing partner of Banta Immigration Law, prepared in conjunction with a different petition. . . .
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> Under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*2*), if an appeal is otherwise properly filed without a Form G-28, then USCIS must contact the attorney and attempt to obtain the required form. Therefore, on August 31, 2011, the AAO instructed [redacted] to submit the required form within ten (10) calendar days. . . . The allotted time has elapsed, and the AAO has received no response from [redacted] or any other attorney at the firm.
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> Because an attorney filed the appeal without a new, properly executed Form G-28, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*2*)(*i*) requires the AAO to reject the appeal.

The petitioner's present attorney of record is the managing partner of the law firm that employed [redacted] and [redacted]. On motion, counsel does not contest any of the facts stated in the AAO's September 2011 rejection notice, and counsel does not dispute that a newly executed Form G-28 was required on appeal. Counsel acknowledges that [redacted] did not respond" to the AAO's request for a new Form G-28. Counsel explains that [redacted] had left the firm by the time of the AAO's

August 2011 request, and asserts: "Had this matter been properly brought to my attention, I would have explained the circumstances to the AAO."

Regarding the initial filing of the appeal, counsel claims: "[redacted] . . . had signed the I-290B form to appeal the denial but had not filed it. When I discovered that the I-290B form had not been filed and furthermore, that [redacted] had not obtained a G-28 form from the petitioner, I signed and included in the package a G-28 form. . . . The NSC [Nebraska Service Center] Director obviously found my G-28 acceptable."

The record shows that present counsel ([redacted]) did not sign a new Form G-28 to accompany the appeal. Rather, the Form G-28 that accompanied the appeal was a photocopy of a Form G-28 that had [redacted] had previously signed and dated May 17, 2010. That photocopy shows a USCIS receipt stamp dated June 24, 2010, at 8:00 a.m., the same date and time stamped on the Form I-290B. [redacted] had originally signed that Form G-28 to accompany another petition filed by the same petitioning employer on May 18, 2010. If the director "found [that] G-28 acceptable," the director did so in error.

Counsel has not disputed the basic facts underlying the AAO's rejection notice: the appeal did not include a new Form G-28 signed by an authorized official of the petitioning entity and by [redacted] (the party who signed the appeal form), and the AAO received no response when it requested that required form. Without that Form G-28, the AAO had no authority to accept the appeal as properly filed, and the regulations cited above therefore compelled the rejection of the appeal.

In an effort to show that the AAO based its decision on an incorrect application of law or USCIS policy, counsel quotes the USCIS regulations at 8 C.F.R. §§ 103.3(a)(2)(v)(A)(*2*)(*ii*) and (*iii*). To provide context, the AAO will here quote the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*2*) in full, including all three subclauses:

> (2) Appeal by attorney or representative without proper Form G-28—
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> > (i) *General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.
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> > (ii) *When favorable action warranted.* If the reviewing official decides favorable action is warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request. If Form G-28 is not submitted within the time allowed, the official may, on his or her own motion, under Sec. 103.5(a)(5)(i) of this part, make a new decision favorable to the affected party without notifying the attorney or representative.

> (iii) *When favorable action not warranted.* If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

Counsel asserts that the term "reviewing official" in the above regulations "obviously refers to the Director of the Service Center receiving the appeal, or his/her designee." Therefore, contends counsel, the obligation to request a new Form G-28 rested with the director, not the AAO, and thus "the AAO improperly, and without legal authority, instructed [redacted] . . . to submit a properly executed Form G-28."

Counsel correctly notes that the AAO, rather than the director, requested the Form G-28, but does not explain why that fact should nullify the AAO's request or mitigate subsequent events (or the lack thereof). The regulation at § 103.3(a)(2)(v)(A)(*2*)(*i*) clearly requires a Form G-28 for the attorney filing the appeal, in this case [redacted]; an older, photocopied Form G-28 for a different attorney does not satisfy any part of that requirement. The director's failure to notice this deficiency does not constitute a binding stipulation on all of USCIS to consider the appeal to have been properly filed. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO could have remanded the appeal to the director, with instructions for the director to request the proper Form G-28, but issued the request itself in the interest of efficient and expeditious processing of the appeal. Counsel submits no evidence to show that his firm would have submitted a new Form G-28 from [redacted], but only if that request had come from the director instead of the AAO.

Counsel also protests that the AAO "erred again by giving only 10 calendar days" for the firm to submit the Form G-28 from [redacted]. Counsel observes that the regulation at § 103.3(a)(2)(v)(A)(*2*)(*ii*) allows a 15-day response period. Counsel does not show, however, that this five-day difference is what prevented counsel from submitting the required Form G-28 from [redacted] or even from providing an explanation regarding [redacted] departure from the firm. Therefore, counsel has not shown that the ten-day response period in any way prejudiced what would otherwise have been a timely and complete response to the AAO's August 31, 2011 notice.

Counsel notes that, if USCIS does not contemplate favorable action on appeal, the regulation at § 103.3(a)(2)(v)(A)(*2*)(*iii*) includes "[n]o regulatory time limit, during which the new Form G-28 was to be submitted to the AAO." The apparent implication is that a given petitioner should have an indefinite period of time in which to execute and submit the Form G-28. The AAO rejects this interpretation

outright; USCIS will not hold an appeal in abeyance, potentially for months or years, waiting for a requested Form G-28 that the regulations require.

The motion includes a newly-executed Form G-28, naming [redacted] as the petitioner's attorney of record. [redacted] did not sign the initial Form I-290B Notice of Appeal, and therefore his new Form G-28 does not remedy the original deficiency that led to the rejection of the appeal. Furthermore, the AAO had already provided counsel's firm an opportunity to submit the Form G-28. Counsel repeatedly acknowledges that there was no response to the request. Therefore, counsel's firm forfeited the opportunity to resolve the matter in a timely manner. The fact that the AAO, rather than the director, issued the request did not in any way absolve counsel of the need to respond to the request, or grant counsel an endless span of time in which to address it.

Counsel has not shown that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the filing does not meet the requirements of a motion to reconsider, and the AAO must dismiss the motion as required by 8 C.F.R. § 103.5(a)(4).

ORDER: The motion is dismissed. The AAO's rejection notice of September 22, 2011 is undisturbed.